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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 243

THOMAS LETCHOS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Thomas Letchos, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the case of *United States of America*, Plaintiff-Appellee, v. *Thomas Letchos*, Defendant-Appellant, Number 13856.

JUDGMENT, OPINION AND ORDERS OF THE COURTS BELOW.

The judgment, conviction and sentencing by the United States District Court for the Northern District of Illinois, Eastern Division, was entered and imposed on June 6, 1962. They are not reported, but appear in the printed

Appendix filed, and certified by the Clerk of the United States Court of Appeals for the Seventh Circuit as a part of the record and transmitted herewith.

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming such judgment, was filed May 3, 1963, and is not yet reported, but is set forth in Petitioner's Appendix hereto (*Infra*, pp. 2A-10A), and in the certified copy of the record.

Petition for rehearing was denied on May 28, 1963. No opinion was rendered on the Petition for Rehearing, and the Order denying said Petition is not reported, but is set forth in Petitioner's Appendix hereto (*Infra*, p. 11A), and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on May 3, 1963. On May 28, 1963, it was ordered that the petition for rehearing be denied. (These orders appear in Petitioner's Appendix hereto (*Infra*, pp. 1A, 11A).) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Where one trial Judge has stated that Jurors had lied on their *Voir Dire* to avoid service in a long case; and, the Judge in the instant case recognizes that his Court may be improperly constituted because five of those jurors (stated to be liars) sat on and adjudicated this cause, hav-

ing shown a willingness to lie on their qualifications to avoid inconvenience, is there not a deprivation of due process and trial by jury, as guaranteed by the Constitution?

2. Do seven *good* jurors out of twelve satisfy the requirement of the Constitution for Jury trial of a person accused of crime?

3. Where the evidence of government agents is exclusive, crucial, and controlling on the issue of guilt, and members of the jury have stated under oath in one Court that they would give special credence to the testimony of such Agents, and in the case at bar, on the succeeding Court day, that would not give special credence to the testimony of such agents, and where the trial judge and the defendants were unaware of these divergent answers under oath, was not the defendant denied due process when he presented evidence on the diverse oaths of the five jurors on the singularly material question and was refused relief?

4. Where, unknown to the defendant, five of his jurors had made diametrically opposite statements under oath, concerning their qualifications to sit as jurors, and the trial court has in effect, made a finding that the said five jurors perjured themselves on a question vital to the issue, to-wit: the credibility of government agents as against the credibility of the defendant, does not the fair administration of justice require that a conviction, entered upon the verdict of these five jurors, and seven others, be set aside and held for naught? Must it not be so held where the trial judge himself expressed a "dilemma I have been wrestling with", a recognition that a verdict has been returned by a jury, possibly disqualified? Must not a conviction on such verdict be held for naught, when the trial court even refused to conduct a hearing on this crucial and controlling issue of disqualification?

5. Is not the failure of the jurors on this trial to disclose their bias confessed on the previous court day, a concealment of material information bearing upon their qualification, a practice condemned by this Court in *Clark v. United States*, 289 U. S. 1?

6. Did not the Court of Appeals for the Seventh Circuit err in sustaining the District Court Judge's denial for the Motion for a new trial in the circumstances described above?

7. Was not the clear intendment of the trial judge, in requiring the names of the jurors admitting to bias be recorded, to strike from the rolls of Jurors all persons whose names were required to be stated of record?

8. Where it is admitted in a criminal trial that five out of twelve jurors have confessed to a bias absolutely prejudicial to this Petitioner on the court day previous to the trial herein in a court room in the same District Court, does not the failure of the judge to exclude them from serving and of the Jury Commissioner to discharge such jurors from further service call for the exercise of the supervisory powers of this Court, not only in the instant case, but in the overall conduct of the jury selection system?

STATUTE AND RULE INVOLVED.

Federal Rules of Criminal Procedure, Rule 23, United States Code (Title 18) provides as follows:

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

Judiciary and Judicial Procedure, Title 28, United States Code provides:

§ 1863. Exclusion or excuse from service.

(a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.

STATEMENT OF THE CASE

In 1960, one Anthony Joseph Accardo was indicted in the United States District Court for the Northern District of Illinois, Eastern Division, on the charges that he did subscribe his income tax returns for the years 1956, 1957, and 1958, making therein written declarations which he did not believe to be true, and in violation of Title 26, U. S. C. 7206 (a). Specifically, the charges were that he stated in the several returns that he was, during the respective tax years, employed by Premium Beer Sales, Inc., and that while so employed, 80 or 90% of the automobile expenses involved in the operation of a certain Mercedes Benz automobile were incurred by him in promoting beer sales for the said Premium Beer Sales, Inc. (Government's Exhibit 4).

The trial of the Accardo case began on September 12, 1960. (App. 2.) On October 20, 1960, this Petitioner, Thomas Letchos, was called as a defense witness on behalf of the defendant, Accardo. In essence, he testified that he knew Mr. Accardo; that Accardo was employed by Premium Beer in 1956, 1957 and 1958, selling beer; that Accardo made a business call on him in June or July, 1956, and at that time he purchased 4 cases of Fox Head Beer from Accardo, after which the beer driver was instructed to see that he, Letchos, the owner of a restaurant called "Tom's Steak House", had 4 cases on hand every time the driver made a call; that Accardo came to Letchos' place of business (Tom's Steak House) several times a year during 1956, 1957 and 1958. (Government's Exhibit 2B, pages 3624-3634.)

On cross-examination, so far as it is pertinent to this

Petition, the Petitioner, Letchos, testified to having an interview with two agents of the International Revenue Service on January 6, 1960 (Government's Exhibit 2B, p. 3667), and the questioning continued:

"Q. Did you not at that time and place state to the two agents of the Internal Revenue Service that you had never seen nor met Mr. Anthony Joseph Accardo whose photograph was displayed to you? * * *

"The Witness: Yes, I remember they showed me two small photographs, and one I said, 'This is Jackie Cerone,' and I said, 'The other one, I don't know. I can't tell you.'

"And then they said, 'Is this Jackie Cerone and Tony Accardo?'

"I say, 'If that's him.' I say, you know, 'by asking me, I can't tell from a small photograph, small snapshot.'

"Q. Did they not at that time and place identify the photograph as that of Anthony Joseph Accardo?

"A. They told me that was him because I told him I can't recognize him in the photograph * * *.

"Q. Did they not tell you that was a photograph of Anthony Joseph Accardo?

"A. They did * * *.

"Q. Did you not at that time and place, Mr. Letchos, tell the two agents of the Internal Revenue Service that you had never seen Mr. Accardo?

"A. I did not, I told him—

"Q. Just yes or no.

"A. No, sir. * * *.

"Q. Did you not tell these Internal Revenue Agents that Mr. Accardo had never sold you beer? * * *

"The Witness: No, I never told them that."

(Government's Exhibit 2-B, pp. 3669-3677, Supp. App. 7-9.)

The witness Letchos then testified that the agents showed him a small photograph, which they identified to Letchos as being that of Anthony J. Accardo.

"Q. I show you Government's Exhibit 86 for iden-

tification and ask you if this is the photograph which they showed you?

"A. I don't remember if that is the same card or another card * * *.

"Q. Did you not at that time and place, * * * tell Internal Revenue Agents Tobias and Conroy that you had purchased Lowenbrau Beer since 1955 from Mr. Joseph Bronge, the West Town Distributing Company, and that when Bronge started handling Fox Head beer, he came in to see you and asked you whether or not you would purchase Fox Head beer, at which time you did?

"A. I did not (make that statement) * * *.

"Q. Did you not at that time and place tell Agents Tobias and Conroy that you had never met Mr. Accardo? * * *

"A. No, I didn't make such a statement. * * *

"Q. Did you not at that time and place tell Agents Conroy and Tobias that Mr. Accardo is completely—or was at that time completely unknown to you? * * *

"A. No, no.

"Q. And did you not at that time and place tell these Agents of the Government that Mr. Accardo had never sold you any beer?

"A. I didn't tell him that." (Government's Exhibit 2, p. pp. 3679-3685).

On January 31, 1961, Thomas Letchos was indicted for perjury, for stating on the Accardo trial that he did not make certain statements to two Internal Revenue Agents. The statements he denied having made were charged as:

"1. That he had never seen Mr. Accardo;

"2. That Mr. Accardo had never been in his place of business;

"3. That Mr. Accardo had never sold him beer;

"4. That he had purchased Lowenbrau beer since 1955 from Joseph Bronge of West Town Distributing Company, and when Bronge began handling Fox Head beer, Bronge

came in to see him and asked whether or not he would purchase Fox Head beer, at which time he did" (App. 3-4). In charging the materiality element, the indictment states:

> "During the course of the (Accardo) trial it became material for the court and jury to learn whether the said Anthony Joseph Accardo had performed any services for Premium Beer Sales, Inc. during the years 1956, 1957 and 1958. It further became material for the court and jury to learn whether or not certain witnesses who testified on behalf of the said Anthony Joseph Accardo had previously made statements to Agents of the Federal Government which were inconsistent with their testimony in said case." (App. 2-3).

The Proof.

The government's proof of the charge of perjury against this Petitioner relied on the testimony of Internal Revenue Agents Conroy and Tobias. Essentially the same, their testimony was that they had interviewed Thomas Letchos at his restaurant on January 6, 1960, and that he did at that time make to them the statements numbered, 1, 2, 3 and 4 above.

The Jury.

The jury in this case was impanelled before the Honorable Hubert L. Will, a judge of the United States District Court for the Northern District of Illinois, Eastern Division on Monday, January 3, 1962. There were accepted by the Petitioner without challenge as part of the twelve following named persons:

> Joseph Vision; Julia Amato, Joseph T. McCormick; Mary W. Moore; and Edward Jewell (Supp. App. 3, 9, 33, 36).

On the Friday previous, January 19, 1962, in the course of selecting a jury before the Honorable Joseph Sam Perry,

a judge of the same Court, the same named five were interrogated as to their qualifications. In the course of that interrogation before Judge Perry, defense counsel Eben asked:

"What about this business of giving more weight to the testimony of a law enforcement officer? * * * But in arriving at whether he is proven guilty you must consider the evidence, would you give more weight to the testimony of a—a law enforcement man? * * * Mrs. Moore?

"A. (By Juror Mary W. Moore.) That's a very difficult question. These folks come to us and we have lots of respect for the F. B. I. and they have no motives to do it. The witnesses that the defense will bring we don't know at all, we don't know their background. I am also devoted to the idea that every man deserves a fair trial and I will certainly listen to every word of their defense, but I do think maybe that these folks come to us with a recommendation and you bring unknown witnesses to me.

"Q. You see, your thinking I gather is somewhat ambivalent on this. We all respect the FBI, there's no question about that. They've done a great job over the years. But I gather from what you say that because of this respect that you would be inclined to give a little more weight to their testimony.

"A. (By Juror Moore.) I don't know how I could help but do that.

"The Court: Juror excused for cause."

"Q. Would you place more weight upon the evidence given by a law enforcement officer, such as an FBI agent, in this case should one or more of them testify, simply because of the fact that they are law enforcement officers?

"A. (By Juror Joseph F. Vision.) Well, in all honesty, I must say that I probably would.

"Mr. Eben: A very frank answer. I appreciate your frankness in giving it.

"The Court: Juror excused for cause."

* * * * *

"The Court: There is not much use in this court wasting time. If there are a number of jurors who feel—if there are jurors who feel that they would attach more significance to the testimony of an FBI agent or policeman or a law enforcing officer, just because he is a law enforcing officer, we might as well excuse those persons right now. There's no use in wasting time of this court on that, and I would like each and every juror who has that feeling, let's quit wasting time on this matter. A person who has that feeling is not qualified for a juror, because humans are human beings and I as a judge am not entitled to have any more attached to my testimony if I should be called to testify than a brick mason or a farmer because he is a farmer. You must measure the testimony by the quality of the man and not by the position that he holds. If there are jurors or persons who have that feeling raise your hand and we will get rid of you."

"(Several prospective jurors raised their hands.)

"The Court (Continuing.) All right. Each of you jurors come around here and let's take your names. It seems to me it's a sad state of affairs if we've got jurors who either want to get out of jury service or something else, but let's know about this.

"It seems to me there is a general conspiracy here to get out of jury service, and it seems to me that you're finding an easy way out by saying that you are prejudiced against the defendants and in favor of the FBI. It's a sad state of affairs, but I will take your names. Come around here.

"When we reach that state of affairs we are really in bad shape in this country. * * *

"The Court is not going to waste any time by this group giving foolish excuses. We will impanel a jury that does approach this and is willing to meet their responsibility as citizens.

"Wait a minute. I want to know the names so it is

out loud here into the record. What's the name? * * *

"A Juror (Edward Jewell.): Edward Jewell, J-e-w-e-l-l.

"The Court: Excused. * * *

"A Juror (Julia Amato): Julia Amato, A-m-a-t-o.

"The Court: Excused. * * *

"A Juror (Joseph McCormack): Joseph McCormack.

"The Court: Excused. * * *

"I don't believe these jurors are truthfully telling us this. I believe they are finding a way to avoid their service as citizens as jurors in this case." (App. 160-164.)

On Monday following, the Honorable Hubert L. Will impaneled the present jury. Using a different form than that employed by Judge Perry, Judge Will assumes the major interrogation requesting that any uncertainty or dispute on any of the basic questions be indicated by a show of hands (Supp. App. 5). In the course of such questioning he asked:

"It is anticipated that some of the testimony in this case will be presented by government internal revenue agents or perhaps Federal Bureau of Investigation Agents. Do you have any prejudice for or against testimony which is presented by agents of the United States Government? In other words, would you give to it more or less credence than you would give to the testimony of any other witness who gets on the stand? Is there anybody who would be inclined to give it more or less credence? You would treat such a witness exactly the same as you would treat a civilian or non-governmental official, is that correct?" (Supp. App. 6.)

No showing of hands, no basis for more probing questioning because of possible prejudice occurred at that time. (App. 168.)

Neither the trial judge nor defense counsel were aware of what had transpired before Judge Perry on the pre-

ceding Friday. (App. 168-9.) Neither occasion, suspicion or knowledge gave them doubt of the sincerity or truthfulness of the entire jury's acquiescence by silence.

When, after trial and verdict, defense counsel became aware of these matters, he immediately brought it to the Court's attention by an Amended Motion for New Trial. (App. 155-164.) The Government's Answer was merely a denial that the five jurors had "Disqualified themselves in the Courtroom of Judge J. Sam Perry upon the voir dire examination on Friday, January 19, 1962." (App. 166.)

The Court below resolved the issue because of his personal conviction that the acquiescence by silence constituted a truthful answer, even though knowledge of a contradictory verbal response had been made under oath on the previous court day. (App. 180-181.)

On the basis of that personal conviction of the trial judge, the Court of Appeals for the Seventh Circuit refused the contention of this Petitioner that the Jury was unqualified. (*Infra*, 9A-10A.) Such resolution took the form of Judge Will's remarks on ruling on the Motion for New Trial as the decision of the Court of Appeals.

Other remarks of Judge Will, in his rulings, are pertinent to the questions not set forth in the opinion of the Court of Appeals to be presented to this Honorable Court. Those statements are as follows:

> "Mr. Cotsirilos: If we had a situation where, perhaps there were five or ten witnesses in the Government's case, and only two or three were police officers or FBI agents, or Internal Revenue agents, and the other three or four witnesses made out a prima facie case or made out some sort of a case, I would see some merit to the notion that perhaps the credence that they would give a police officer or FBI agent didn't make that much difference.
>
> "But here, the Internal Revenue agents, Judge, are

the very basis of the Government's case. Without them, you don't have a charge.

"Can you tell me, your Honor—and I am not cross-examining the Court—that we started out here on a fair ground with five jurors who were ready to give greater credence to Internal Revenue agents than to anyone else?

"The Court: You know, Mr. Cotsirilos, that one of the problems that we have here in this situation is whether your last statement is really correct; that is, that these five jurors were willing to give greater credence to the testimony of a Government agent rather than to another witness because it is perfectly apparent from reading the transcript that Judge Perry didn't think that they were. He thought that they were using this rationalization as a way to get out of serving on the jury in a case which was going to run, as everybody up there knew, six to eight weeks.

"His whole scolding, he says in so many words, you know, I don't think you are telling me the truth when you say you would give more credence to a Government agent. You are just trying to get off this Jury. That is what he says in so many words.

"Mr. Cotsirilos: Then we can't believe people when they answer on a jury?

"The Court: That is the dilemma I have been wrestling with. It is really not and has not been whether these people started out with a prejudice in favor of the testimony of the Government's agents, but whether as a result of their performance in Judge Perry's court room which I was not familiar with at the time they were here, they demonstrated a different defect which in that they are prepared to make a misstatement as a way of avoiding jury service on extended trial.

"This is what I was wrestling with, to be honest with you." (App. 171-173.)

REASONS FOR GRANTING THE WRIT.

I.

The Finding of One District Judge That Jurors Have Lied on Their Oath on a Material Question on Voir Dire and Are Unqualified to Sit as Jurors and the Trial Judge Having Recognized an Apparent Defect in the Same Persons' Qualifications to Serve as Jurors, Leaving Out of Twelve, but Seven Competent Jurors Upon Whose Verdict Conviction Rests, There Has Been a Violation and Perversion of Rule 23(b) of the Federal Rules of Criminal Procedure, Calling for the Exercise of This Court's Supervisory Power.

On the court day prior to the impaneling of this jury, five accepted on this jury confessed that they would believe the testimony of a law enforcing officer over that of another witness simply because they were law-enforcing officers.

Of them, on this previous court day, the district judge found these jurors "not qualified for a juror" (App. 162); general conspirators to get out of jury service (App. 163); unwilling to meet their responsibilities as citizens (App. 163); liars to avoid their obligations as citizens (App. 164).

It is obvious that the judge's conviction disqualified the jurors. It is, further, obvious that the conviction of the judge, if substantiated in a proper hearing, constituted a contempt of the very court in which they were thereafter to enter a guilty verdict against this petitioner. *Clark* v. *United States*, 289 U. S. 1; *People* v. *Hadesman*, 223 Ill. App. 219.

After trial, after verdict, these matters first came to the attention of the trial judge and the defense. The trial

judge recognized the questionable competence of nearly half of the jury, which returned the verdict against this petitioner:

> "The Court: That is the dilemma I have been wrestling with. It is really not and has not been whether these people started out with a prejudice in favor of the testimony of the Government's agents, but whether as a result of their performance in Judge Perry's court room, which I was not familiar with at the time they were here, they demonstrated a different defect which is that they are prepared to make a misstatement as a way of avoiding jury service on extended trial. This is what I was wrestling with, to be honest with you." (App. 172-3.)

On this record only disqualification can be inferred. Thus, out of twelve, only seven jurors can be considered competent. There was neither stipulation to less than twelve, nor occasion therefore.

The district court, by its inaction, and the Court of Appeals, in sanctioning the inaction, have violated the plain direction of Rule 23(b) of the Federal Rules of Criminal Procedure that "Juries shall be of 12 * * *."

This Court should enforce those rules in the exercise of its supervisory power over lower courts.

II.

Where the Trial Judge Is Apprised That Five of the Jurors Who Sat on This Cause Have Been Considered by Another Judge of the Same Court to Have Perjured Themselves on a Question Vital and Crucial to the Issue, in Fact, Constituting the Sole Issue To Be Decided by Them: the Credibility of Government Agents as Against the Credibility of the Defendant; and the Trial Judge Refuses Relief, or Even to Conduct a Hearing, There Has Been Such a Departure From the Accepted Course of Judicial Process and Fair Administration of Justice, as to Call for the Exercise of This Court's Power of Supervision to Correct the Wrong.

Of course, the opportunity is now past, but even the modest relief of a hearing urged upon the trial court was denied. Defense counsel urged it on the motion for new trial:

> "Now, here we are, Friday to Monday, only two days, and actually they answered the question on the prior court date, and in the interim, what caused them to change their minds, if they did change their minds?" (App. 171.)
>
> "* * * It was five jurors, and the only way that we can really know is to interrogate these jurors." (App. 171.)
>
> "Is your Honor now suggesting that the only way you could be satisfied to grant a new trial is to bring those five jurors and question them further?" (App. 177.)

The colloquy continued:

> "Mr. Cotsirilos:
>
> "* * * Is your Honor now suggesting that the only way that you could be satisfied to grant a new trial is to bring those five jurors and question them further?"
>
> "The Court: No, I wasn't suggesting that. I

thought I said that I am already satisfied without further interrogation of these jurors, on inspection of all the documents which you have submitted, on examination of my notes on the voir dire * * *."

"Mr. Cotsirilos: Are there no other theories, your Honor, and just as reasonable theories, that these people might very well have told the truth before Judge Perry, and when they came here their silence indicated that they might still have the same opinion, but it was convenient and comfortable for them to remain silent? * * *" (App. 177-8.)

Both parties and judge were acutely aware of the importance of the testimony of the agents. It was crucial to the government's case. Actually, the sole jury question was the issue of the credibility of the defendant as against the credibility of the Internal Revenue agents. Defense counsel clearly depicted the situation:

"* * * Now, here we are, Friday to Monday, only two days, and actually they answered that question on the prior court date, and in the interim, what caused them to change their minds, if they did change their minds? * * *

"This is an embarrassing thing to a juror who comes here only for a short time. Judge, I don't think this assumption is an illogical assumption. As a matter of fact, I think that if it had occurred with only one juror or two jurors, one might say, the court would now be justified in saying, that perhaps they now had learned, perhaps they were able to put side their notion that an FBI man is deserving of greater credence. But it was five jurors, and the only way that we can really know is to interrogate these jurors. * * * I think it is so highly prejudicial to start out with half of your jury ready to believe and give more credence to the two people who are the very basis of the Government's case that no defendant can get a fair trial under those circumstances. If we had a situation where, perhaps, there were five or ten witnesses in the Government's case, and only two or three were police officers or FBI agents or Internal Revenue agents, and

the other three or four witnesses made out a prima facie case or made out some sort of a case, I would see some merit to the notion that perhaps the credence that they would give a police officer or FBI agent didn't make that much difference.

"But here, the Internal Revenue agents, Judge, are the very basis of the Government's case. Without them, you don't have a charge. * * *" (App. 171-172.)

It is not enough to say as did the trial judge here that "These jurors have been liars before, but they didn't lie to me." Due process of law and the fair administration of justice entitles a defendant to more than the casual observance by a trial judge of a silent jury.

III.

The Decision of the United States Court of Appeals for the Seventh Circuit, Sanctioning the Action of the District Court in Refusing to Declare the Conviction Void Because It Was Rendered by a Disqualified Jury, and to Order a New Trial Is in Conflict With the Decision of This Court in Clark v. United States, 289 U. S. 1.

This Court has had few opportunities to pass on the effect of concealment or misstatement by a juror on matters affecting his qualifications to serve. But it has had sufficient opportunity to have held forthrightly and unequivocally that such concealment or misstatement is contempt if its tendency and design are to obstruct the processes of justice. *Clark* v. *United States*, 289 U. S. 1, 10.

The circumstances here are not unlike those in *Clark* v. *United States*, 289 U. S. 1, 10. Here, too, the jurors had been warned their bias would lead to challenge and rejection. With minds full of the warning, indeed the excoriation, they concealed the bias so significant in this case, where the oath of the defendant was balanced against

the oaths of the law enforcing agents. Any admission that the latter would be given greater credence was of obvious and immense value to the defense. That such admissions had been so recently made was a matter of incalculable value.

It was held in *United States* v. *Clark*, D. Minn., 1 F. Supp. 747, 751, that a juror should, whether specially questioned or not, disclose any material information which might bear upon his qualification. It cannot be contended that these five jurors were not aware, acutely aware, of the significance of a bias so strong it sought recent expression. It cannot be so contended, when that recent expression resulted in unceremonious banishment from a courtroom.

It is apparent that concealment of the bias of the incident of admitting a bias, accomplished the acceptance of these five as jurors on this trial. It is equally apparent that under cover of the concealment the course of justice was obstructed.

Paraphrasing this Court's remarks in *Clark* v. *United States*, 289 U. S. 1, 11: What was sought to be attained was the choice of impartial arbiters. What happened was the intrusion of partisan prosecutors.

IV.

The Case Demonstrates a Void in the Proper Implementation of the Power of the District Judge to Exclude Any Person From Jury Service (Title 28, U. S. C. 1863). This Court Should Determine and Direct a Proper Procedure to Effectuate the Intent of the Congress in Granting to the District Judge the Power to Exclude.

The record in this cause makes it eminently apparent that, on the Court day prior to their being sworn as jurors in this cause, another district judge had found five of the twelve unfit to sit as jurors for the basic fault of a willingness to lie under oath as to their qualifications as jurors.

Judge Perry called forth those jurors he considered liars, conspirators to get out of jury service; he required each identify himself on the record (App. 163-164). His clear intendment was that these identified jurors be stricken from the rolls, that another unsuspecting defendant be shielded and protected from a jury of such propensity. He should have clearly ordered their names stricken in view of stated conviction that they were willing to be untruthful to avoid their service as citizens. (App. 164.)

The Jury Commissioner should have discharged these jurors from further service.

No effective procedure—indeed, no procedure is in existence to accomplish this necessary end. This Court should exercise its supervisory power, and declare this trial "tainted in its origin . . . a mere pretense and sham."*.

This Court should formulate and articulate a procedure to avoid recurrence of this hapless situation, so that a basic fault in jurors found by one judge may be communicated to his brothers and to the parties.

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* 289 U. S. at p. 11.

CONCLUSION.

Wherefore, for the foregoing reasons, Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.
Friday, May 3, 1963.

Before
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge.

United States of America,
Plaintiff-Appellee.
No. 13856 *vs.*
Thomas Letchos,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 13856 September Term, 1962 April Session, 1963

United States of America,
Plaintiff-Appellee,
vs.
Thomas Letchos,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 3, 1963

Before CASTLE, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge*: The defendant Thomas Letchos, was convicted after trial by jury of the crime of perjury, in violation of Title 18 U. S. C. § 1621. From a judgment entered thereon defendant appeals.

The alleged perjurious statements of defendant were made during the course of a trial of one Anthony Joseph Accardo wherein Accardo was charged with false statements in his income tax returns in claiming deductions for certain automobile expenses incurred by him as an agent for Premium Beer Sales, Inc. See *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962). Prior to the Accardo trial Internal Revenue Service agents interviewed many witnesses in an effort to ascertain the authenticity of Accardo's claim that he was a beer salesman for the years in which he claimed tax deductions. Defendant Letchos was one of those interviewed by agents Conroy and Tobias.

In summary, the evidence, taken most favorably for the government, shows that on January 6, 1960, in an interview held at Tom's Steak House (an establishment owned by the defendant), defendant told the agents that he had been taking Lowenbrau beer since he started in business in June, 1955; that the first order was given to a Joseph Bronge of the West Town Distributors; that he had taken Fox Head beer about July 19, 1956; that Bronge came to him at that time and told defendant he was now handling Fox Head beer, and out of friendship for Bronge, he took some at Bronge's request; that agent Tobias showed defendant some photographs and said, "Here are pictures of two fellows who are presumed to be beer salesmen. Do you know them?"; that defendant said, "I don't know him, but this is Jack Cerone"; that Tobias, pointing to the picture said, "This is the picture of Anthony Accardo, also known as Joe Batters. Now do you know him?" and defendant said, "I still don't know him"; that during the examination of the photographs, Tobias asked defendant if Anthony Accardo had ever been in to sell him beer, to which defendant replied "No"; that Tobias then asked if Anthony Accardo had ever been in the place so far as defendant knew for any purpose, and defendant answered that so far as he knew, he had never been in, that he didn't know him.

The Government introduced into evidence the report of Tobias and Conroy dealing with the interview with defendant, and also the original notes taken by Tobias during the course of the interview. Both agents used these documents prior to trial for the purpose of refreshing their recollections as to the events of January 6, 1960. The Government also introduced a report made prior to this trial of an interview by the Federal Bureau of Investigation of agents Conroy and Tobias concerning the events of January 6, 1960.

At the trial of Anthony Joseph Accardo, Accardo called

defendant as a witness and defendant testified in substance that he knew Accardo; that Accardo was employed by Premium Beer in 1956, 1957, and 1958, selling beer; that Accardo made a business call on him in June or July, 1956, and at that time he purchased four cases of Fox Head beer from Accardo, after which the beer driver was instructed to see that he, defendant, had four cases on hand every time the driver made a call; that Accardo came to defendant's place of business several times a year during 1956, 1957, and 1958.

On cross-examination in the Accardo trial, defendant testified to having had an interview with two agents of the Internal Revenue Service on January 6, 1960, and testified further:

I.

"Q. Did you not at that time and place, after having been shown a picture of Mr. Accardo and having had the picture identified as Mr. Accardo, tell these two Revenue Agents that you had never seen, never met, never heard of Mr. Accardo?"

"A. I did not."

* * * * * *

"Q. Did you not at that time tell these Internal Revenue Agents that you had never seen Mr. Accardo?

"A. No."

II.

"Q. Did you not tell them that he had never been in your place of business?

"A. No, sir, he is a steady customer. How can I say he never had been in my place of business?

"The Court: Then your answer is no? Is that right? Is that your answer?

"The Witness: No."

III.

"Q. Did you not tell these Internal Revenue Agents that Accardo had never sold you beer?

"A. No, I never knew Mr. Accardo before he sold me the beer, I told them.

"The Court: Read the question to the witness. (Question read.)

"The Court: What is your answer?

"The Witness: No I never told them that."

IV.

"Q. Did you not at that time and place, Tom's Steak House, on January 6, 1960, tell Internal Revenue Agents Tobias and Conroy that you had purchased Lowenbrau beer since 1955 from Mr. Joseph Bronge, the West Town Distributing Company, and that when Bronge began handling Fox Head beer, he came in to see you and asked you whether or not you would purchase Fox Head beer, at which time you did?

"A. I did not."

In an effort to impeach defendant's testimony in the Accardo trial agents Conroy and Tobias were called to testify in that case. Their testimony reaffirmed their version of the January 6, 1960, interview summarized above.

On January 31, 1961, defendant Letchos was indicted for perjury for falsely testifying in the Accardo trial that he had not made certain statements to two Internal Revenue Agents. The statements he denied having made were charged as:

"1. That he had never seen Mr. Accardo;

"2. That Mr. Accardo had never been in his place of business;

"3. That Mr. Accardo had never sold him beer;

"4. That he had purchased Lowenbrau beer since 1955 from Joseph Bronge of West Town Distributing Company, and when Bronge began handling Fox Head

beer Bronge came in to see him and asked whether or not he would purchase Fox Head beer, at which time he did."

In charging the materiality element, the indictment recites:

> "During the course of the (Accardo) trial it became material for the Court and jury to learn whether the said Anthony Joseph Accardo had performed any services for Premium Beer Sales, Inc. during the years 1956, 1957 and 1958. It further became material for the court and jury to learn whether or not certain witnesses who testified on behalf of the said Anthony Joseph Accardo had previously made statements to agents of the Federal Government which were inconsistent with their testimony in said case."

We begin by saying that we do not believe it can be seriously contested that the evidence supports the conclusion that defendant did make diametrically opposed statements in the investigation interview of January 6, 1960, and during the course of the Accardo trial. The pertinent portions of the Accardo trial transcript were admitted into evidence as Government exhibits in this trial. Agents Tobias and Conroy testified as to what occurred and what was said during the interview, and Government's Exhibit 4, identified as a joint report of agents Conroy and Tobias of their interview with defendant, made two days after the interview, and Government's Exhibit 5, identified as the original notes taken by agent Tobias at the time of the interview, were admitted into evidence.[1]

1. Defendant now contends that the agents' reports (Government Exhibits 4 and 5) should not have been admitted into evidence. The record shows that defendant raised no objection to their admission at the trial and further, that defendant tacitly supported their admission by stressing the use defendant's anticipated strategy would make of the exhibits. In the absence of clear prejudice being demonstrated, we believe defendant has waived his right to attack the admissibility of the evidence at this stage.

Defendant contends that the statements which are the basis for the perjury charge lack the element of materiality, which is necessary for conviction. The indictment in the Accardo case was admitted into evidence along with the transcript of the testimony of defendant *and agents Conroy and Tobias*. As a matter of law the trial judge found the necessary materiality. We believe that conclusion was not based on inferences but rather it is obvious from the evidence introduced in this trial. In *United States* v. *Harris*, 311 U. S. 292, 295 (1940), the Supreme Court of the United States said:

> "Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the Government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction *might* substantially impede effective administration of criminal law."

Impeachment of a witness goes to his credibility and questions on cross-examination for this purpose may be material in the sense required for a perjury conviction. *Blackmon* v. *United States*, 108 F. 2d 572 (5th Cir. 1940). The question here is not the truth or falsity of the prior inconsistent statement. It bears no citation of authorities to show that a mere prior inconsistent statement would not have given rise to a perjury conviction. The question here is whether defendant, while under oath, deliberately lied by denying *the fact* of his inconsistent statements, i.e., that he had ever made the inconsistent statements.

Conviction for such lies must follow only after strict adherence to the safeguards erected to protect witnesses

from too-ready punishment for mere lapse of memory. "Conviction for perjury ought not to rest entirely upon 'an oath against an oath.'" See *Weiler* v. *United States*, 323 U. S. 606, 609 (1945). Among the safeguards is the two-witness rule discussed in our recent case of *United States* v. *Nicoletti*, 310 F. 2d 359 (7th Cir., 1962), also involving a perjury conviction growing out of the Accardo trial.

Agents Tobias and Conroy testified as to the statements made to them by defendant during the interview of January 6, 1960. While they used their notes to refresh their memories, they also testified that they had independent recollection of the events in question. Further, the notes, introduced without objection, tended to corroborate their testimony. The two witness rule was fully complied with.

We also hold that sufficient evidence was introduced to permit the jury to find the necessary wilfulness. "In order to prove perjury, the prosecution must show that the testimony was wilfully given, and wilfulness is a question for the jury. Only by a full understanding of the issues on trial at the time the alleged perjury was committed can the jury determine the wilfulness of the defendant in giving his testimony." *Harrell* v. *United States*, 220 F. 2d 516, 520 (5th Cir., 1955).

It was not necessary to retry the Accardo case for the benefit of the jury in the instant case. If was only necessary to introduce sufficient of the evidence and testimony from that case to permit the jury to make a rational decision as to wilfulness. The jury's finding of wilfulness is fully supported by the record in this case.

The defendant contends that the closing arguments of the prosecution were grossly prejudicial to the defendant, being appeals to class prejudice on the ground of unusual wealth; to passion; to guilt by association; to prejudices fanned by notoriety. We have read the entire opening and closing

final arguments of the prosecution and believe that defendant's contentions are unsound. While isolated remarks, taken out of context, in themselves might call for scrutiny of the record, such scrutiny convinces us that the total effect upon the jury was not such as to incite prejudice, and the statements were within permissive bounds.

Finally, defendants argue that the court below committed prejudicial error in failing to grant a new trial upon the discovery that several jurors impaneled in the instant case had made statements during *voir dire* examinations in another case and before another judge which were inconsistent with their *voir dire* response to questions in the present case. The question involved the prospective jurors' ability to weigh witnesses' testimony without giving undue weight to testimony of law enforcement officers merely because of their position. While being examined for the earlier case several jurors indicated that they would give added weight to testimony of law enforcement officers and were excused. This contention was adequately answered by Judge Will in denying defendant's motion for a new trial on this ground.[2]

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2. The Court: * * *

"With respect to the five jurors who allegedly answered my interrogatory with respect to whether or not they would give more credence or less credence to Internal Revenue or Government Agents than they would to non-official witnesses, if you like, I observed the jury in its response to my interrogatory. In fact, you will recall there was a long—it doesn't appear in the transcript—but there was a very long pause between the question which I asked, and that summary statement in which I said they would not give more or less credence.

"I waited for a considerable time to see if there was any indication on the part of any of the members of the panel that they had any feelings about this. I was not aware at the time that any of them had been interrogated on the same general subject in another case in another court. I don't know what they did in that court room.

We find no error. The judgment is AFFIRMED.

"Mr. Cotsirilos [counsel for defendant]: I have it right here, Judge. I want to introduce it in evidence.

"The Court: I read the transcript, and I said I don't know how they appeared there. I do know how they appeared here. I watched them. I was satisfied they were giving me truthful answers, and I do not feel justified in saying that notwithstanding my observations of these people, that I must now conclude that they lied to me in the answers to the questions which they gave, because all of my observations are to the contrary. All of my observations were that they were taking the voir dire interrogation very seriously, and I think I must say I had the feeling that this was a very conscientious jury overall. I think you gentlemen felt the same as the case concluded.

"The Court: Well, I must say to you, Mr. Cotsirilos, that nothing that I observed in the court room with respect to these jurors would warrant me in concluding they were in any respect not completely qualified and that their deliberations in this case were not consistent with the answers which they gave to all of us, as we all asked them questions on the voir dire and accepted them only after those questions had been answered.

"As a matter of fact, as I recall it, nobody used all the peremptory challenges to which they were entitled. We were satisfied with this jury on the basis of their performance here with a minimum of peremptory challenges.

"The Court: Let me add one further alternative possibility, Mr. Cotsirilos, which you have alluded to and which I think may actually be the truth. That is, as a result of the rather vigorous reaction with respect to indications that they might give more credence to the testimony of a Government agent, that even over the short period of time, over a weekend, these jurors concluded that this was an erroneous position to take, and that they answered truthfully in Judge Perry's court room on Friday, and they answered truthfully here the following Monday.

"In fact, and I must say to you that you recall the voir dire, you will recall the carefulness with which all of us went into the various questions which were asked, and my feeling was that, and it is today, that this jury, as I observed them in the conduct of the voir dire and subsequently in their de-

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago 10, Illinois.

Tuesday, May 28, 1963.

Before

Hon. Latham Castle, *Circuit Judge*,
Hon. Roger J. Kiley, *Circuit Judge*,
Hon. Luther M. Swygert, *Circuit Judge*.

United States of America, *Plaintiff-Appellee*, vs. Thomas Letchos, *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13856

IT IS ORDERED by the Court that the petition for a rehearing of this cause filed by defendant-appellant be, and the same is hereby DENIED.

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liberations and in listening to the case, in their attitude in the course of the presentation of this, it was a very conscientious jury.